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ALEXANDER L. STEVAS,  
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No. 82-1024

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE BOEING COMPANY,  
Petitioner,

v.

THE UNITED STATES OF AMERICA,  
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF CLAIMS (NOW MERGED INTO THE  
UNITED STATES COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT)

BRIEF AMICUS CURIAE OF THE  
FEDERAL BAR ASSOCIATION

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BRIEF AMICUS CURIAE OF THE  
FEDERAL BAR ASSOCIATION

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Pursuant to Rule 36 of the Rules of this Court,<sup>1</sup> the Federal Bar Association respectfully submits this brief amicus curiae in support of the granting of the petition of The Boeing Company ("Boeing") for a writ of certiorari. The question presented by Boeing

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1. Written consents of counsel for both parties have been filed with the Clerk.

raises a substantial constitutional issue which ought to be resolved by this Court.

INTEREST OF THE AMICUS CURIAE  
FEDERAL BAR ASSOCIATION

The Federal Bar Association (FBA) is a voluntary professional organization which has served the federal legal profession for over 60 years. The FBA is composed of nearly 15,000 members and includes lawyers who are or have been in the employ of the federal government, members of the federal judiciary, and other lawyers with a substantial interest in federal law. The FBA's mission, as defined in its Constitution, is "to advance the science of jurisprudence. . .," and its first stated objective is "to serve as the national representative of the federal legal profession." The FBA has an interest, therefore, in the resolution with certitude of substantial constitutional issues affecting the interests of its members. The constitutional validity of the Cost Accounting Standards Board (CASB) is

an issue which affects a substantial number of FBA members with a professional interest in the field of federal procurement practice.

The decision of the Court of Claims, 680 F.2d 132 (1982), in declining to pass on the constitutional issue, creates uncertainty as to the constitutionality of the CASB, and consequently gives rise to uncertainty about the validity of the cost accounting standards used by federal defense agencies and defense contractors in estimating and reporting costs in federal defense procurements. Unless this Court resolves this uncertainty, the status of every future defense contract will remain unresolved, because CASB regulations require all defense procurement contractors to comply with CASB cost standards.

The FBA adopts and agrees with the Questions Presented and pages 1 through 7 of Boeing's petition. The FBA's interest is not in support of either party's position on the merits, but rather in the final resolution of the important constitutional issue presented.

## REASONS FOR GRANTING THE WRIT

It appears that all concerned parties are in agreement that the constitutional question presented is a substantial one. (See Boeing petition, p. 9, fn. 4). The Court of Claims characterized the issue as "by no means insubstantial" and, indeed, the constitutionality of a legislative body appointed by the Congress to promulgate binding rules for the Executive Branch presents a plainly serious issue which this Court should resolve. The 1970 amendment to the Defense Production Act, Pub. L. No. 91-379, 50 U.S.C. app. § 2168, expressly created the CASB "as an agent of the Congress, . . . independent of the executive departments," to be chaired by the Comptroller General, an officer of the legislative branch. The Board was given authority to "promulgate cost-accounting standards" -- a rule-making function -- which standards "shall be used by all relevant Federal agencies and by defense contractors and subcontractors. . ." 50

U.S.C. app. § 2168(g) (emphasis added). The President is given no power of appointment of Board members, and no power with respect to the Board's rulemaking functions. The relevant federal agencies are afforded no discretion to adopt or reject the Board's standards.

Without suggesting a view on the merits, the FBA submits that the validity of the statute creating the CASB under the Appointments Clause of the Constitution, Article II, § 2, Cl. 2, is "an important question of federal law which has not been, but should be, settled by this Court." Rule 17.1(c) of the Rules of this Court. The question should be settled because a CASB regulation requires that all defense contracts contain a clause requiring contractors to comply with the Board's cost standards. 4 C.F.R. § 331.20(a). Uncertainty about the applicable cost standards which will govern billions of dollars worth of future defense procurement contracts is a cloud hanging over the procurement of



goods and services vital to the national defense.<sup>2</sup> If, indeed, the Congress has exercised executive functions in violation of principles of separation of powers, then this Court should address the issue now, before further defense contracts are tainted by possibly invalid standards.

The sole pertinent issue, then, is whether the reasons relied upon by the Court of Claims in declining to reach this issue should foreclose this Court's granting of the petition. The Court of Claims relied upon two reasons. First, it applied the "de facto officer doctrine" and found that the CASB had de facto status and power. Second, the court stated that the Department of Defense (DOD)

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2. While a decision in Boeing's favor would not affect most existing contracts (Boeing petition, p. 12), the question whether the CASB standards were validly promulgated has pervasive implications for defense contracts to be concluded in the future.

has independently adopted the CASB cost standards, giving them the status of executive branch regulations.

These asserted grounds are not sufficient to preclude consideration by this Court of the constitutionality of a Congressional law. Otherwise, an act which may be constitutionally invalid might escape scrutiny by this Court and would continue to have the force of law. A statute which is invalid under the supreme law of the land would be de facto operative into the indefinite future to affect rights and duties. Such a result insults historical precepts of judicial review. The review of the constitutionality of a federal statute is "the most important and delicate duty of this Court." Muskrat v. United States, 219 U.S. 346 (1911). The two grounds relied upon by the Court of Claims to avoid the constitutional issue would, if valid, be present in every case -- not just Boeing's -- so that the constitutional issue might not ever be ripe for decision.

Moreover, the grounds relied upon by the Court of Claims, in refusing to address the constitutional issue, are themselves important issues that should be reviewed by this Court. The Court of Claims' application of the "de facto officer" doctrine to preclude judicial review is certainly questionable, because that doctrine does not bar a non-frivolous constitutional challenge. Glidden Co. v. Zdanok, 370 U.S. 530 (1962). The proposition that DOD independently adopted the cost standards as executive branch regulations appears facially untenable, inasmuch as the statute being challenged expressly requires DOD's adherence to the Board's rules and reserves no discretion or power in the executive branch. Most assuredly, the DOD would not have promulgated precisely the same complex body of cost regulations on its own initiative but for the CASB, so that the "independent authority" argument is a solepcistic fallacy. Thus, this case does not fit in the mold of those cases in which this Court declines to pass

upon a constitutional question if other grounds for decision' are available. See: Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936). The constitutional issue is ripe for adjudication.

#### CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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